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MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

HON. DAVID ROSS, Administrative Judge of the Criminal Court of the City of New York; THE CRIMINAL COURT OF THE CITY OF NEW YORK; FRANK S. HOGAN, District Attorney, New York County,

Petitioners,

against

STEPHEN RADICH,

Respondent.

MOTION FOR EXPEDITED CONSIDERATION OF PETITION AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Motion for Expedited Consideration of Petition	
Opinions Below	4
Jurisdiction	4
Questions Presented	4
Statement	4
Reasons for Allowance of the Writ	7
1. The decision below is in direct conflict with the applicable decisions of this Court	7
2. An important question of public policy is presented, since the effect of the decision below is to nullify the Congressional intent underlying 28 U.S.C. § 2244(c)	10
Conclusion	12
Appendix A	1a
Appendix B	18a

TABLE OF CASES

Brown v. *Allen*, 334 U.S. 433 (1953) 8, 11

Durant v. *Essex Co.*, 74 U.S. (7 Wall.) 107, 113 (1868) 8, 10

Fay v. *Noia*, 372 U.S. 391 (1963) 9

Hertz v. *Woodman*, 218 U.S. 205, 213 (1909) 8, 10

Neil v. *Biggers*, —— U.S. ——, 40 USLW 3410 (1972)

PAGE

Ohio ex rel. Eaton v. *Price*, 364 U.S. 263 (1960) 8

People v. *Radich*, 53 Misc. 2d 717 5

Radich v. *New York*, 400 U.S. 864 5

Radich v. *New York*, 401 U.S. 531 (1971) 5

Radich v. *New York*, 402 U.S. 989 (1971) 5

Sanders v. *United States*, 373 U.S. 1 (1963) 9

Slagle v. *Ohio*, 366 U.S. 259 (1961) 8

Townsend v. *Sain*, 372 U.S. 293 (1963) 9

United States v. *Pink*, 203 U.S. 194, 216 (1941) 8,10

United States ex rel. Biggers v. *Neil*, 448 F. 2d 91 (6th Cir. 1971) 9,10

United States ex rel. Epton v. *Nenna*, 446 F. 2d 363 (1971) 9

STATUTES

28 U.S.C. § 1254(1) 4

2109 7

2244(c) 4, 6, 7, 8, 9, 10, 11

OTHER AUTHORITIES

Developments in the Law—Habeas Corpus, 83 Harvard Law Review 1038, 1152 (1970) 8

45 Texas L. Rev. 592, 595 (1967) 12

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against

STEPHEN RADICH,

Respondent.

MOTION FOR EXPEDITED CONSIDERATION OF PETITION

To: THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Petitioners respectfully move, on the grounds set forth below, for expedited consideration of the petition for a writ of certiorari herein, and if certiorari be granted, for expedited argument so that this case may be heard together with *Neil* v. *Biggers, cert. granted,* 40 U.S.L.W. 3410 (1972). The instant petition presents the question of whether a defendant whose conviction is affirmed 4-4 by this Court may obtain a writ of habeas corpus in the federal courts despite the clear Congressional prohibition in 28 U.S.C. § 2244(c).

Neil v. *Biggers* similarly seeks to present the question of whether a 4-4 affirmance by this Court precludes the issuance of a later writ of habeas corpus to the same prisoner. However, the Court below in *Neil* v. *Biggers*

held that this Court's earlier affirmance was not based upon the same issues as subsequently presented in the writ of habeas corpus:

> "Since certiorari was granted on the issue of voice identification, the briefs presented before the Supreme Court could not expand the scope of the Supreme Court's consideration by merely discussing broader due process questions". 448 F. 2d 91, 96 at n. 4.

In the instant case, it is undisputed that the identical issues raised and passed upon by this Court are now the subject of the same defendant's application for habeas corpus.

Moreover, the within petition squarely presents the related and vital question of whether a defendant who has appealed through the State courts and to this Court on a complete record raising solely legal rather than factual issues, may now proceed to obtain federal court rulings on the identical record.

WHEREFORE, petitioners respectfully request that this Court expedite consideration of the within petition for a writ of certiorari and that if the petition be granted, argument be similarly expedited so that the case may be heard together with *Neil* v. *Biggers*.

Dated: New York, New York May 17, 1972.

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IN THE

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No. .....

HON. DAVID ROSS, Administrative Judge of the Criminal Court of the City of New York; THE CRIMINAL COURT OF THE CITY OF NEW YORK; FRANK S. HOGAN, District Attorney, New York County,

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STEPHEN RADICH,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To: THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Petitioners pray for a writ of certiorari to review the judgment and decree of the United States Court of Appeals for the Second Circuit in the case of *United States ex rel. Stephen Radich* v. *The Criminal Court of the City of New York.* The judgment was entered on April 26, 1972.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is not yet reported and is appended hereto as Appendix "A". The opinion of the United States District Court for the Southern District is not yet reported and is appended hereto as Appendix "B".

Jurisdiction

Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on April 26, 1972, reversing the denial of respondent's petition for a writ of habeas corpus by the United States District Court for the Southern District of New York and remanding for consideration of the merits of the petition.

Questions Presented

1. Whether a defendant whose conviction is affirmed 4-4 by this Court upon a complete record, may relitigate the identical issues upon the same record in the federal courts despite the clear Congressional prohibition in 28 U.S.C. § 2244(c)?

2. Whether a 4-4 affirmance by this Court is a determination on the merits as to the parties in civil cases, but is merely equivalent to a denial of certiorari in criminal cases?

Statement

A.

Respondent Radich was convicted in the Criminal Court of the City of New York on May 5, 1967, of casting con-

tempt on the American flag in violation of § 1425(16)(d), of New York Penal Law (currently § 136[d] of New York's General Business Law). *People* v. *Radich,* 53 Misc. 2d 717.

Radich's conviction was based upon a display of certain constructions in his art gallery on the second floor of 818 Madison Avenue in New York City. One construction was described in the trial court's opinion (53 Misc. 2d at 718) as "in the form of a large cross with a bishop's mitre on the headpiece, the arms wrapped in ecclesiastical flags and an erect penis wrapped in an American flag protruding from the vertical standard". Respondent was sentenced to a $500 fine or in lieu thereof 60 days in the workhouse. Execution of the sentence was deferred pending appeal.

The Appellate Term, First Judicial Department of the Supreme Court of the State of New York affirmed respondent's conviction without opinion on June 13, 1968. 57 Misc. 2d 1082. The New York Court of Appeals affirmed the conviction on February 18, 1970, by a vote of 5-2, 26 N.Y. 2d 114.

Radich appealed to this Court on May 18, 1970. Probable jurisdiction was noted on October 19, 1970. *Radich* v. *New York,* 400 U.S. 864. After oral argument on the merits, this Court affirmed the judgment of the New York Court of Appeals by an equally divided Court. *Radich* v. *New York,* 401 U.S. 531 (1971). Mr. Justice Douglas did not participate in the consideration or decision of the appeal. A petition for rehearing was denied by this Court on May 17, 1971. *Radich* v. *New York,* 402 U.S. 989 (1971). Mr. Justice Douglas did not participate.

B.

Respondent was directed on June 2, 1971, to surrender on June 29, 1971 for execution of his sentence. On June 21, 1971, by order to show cause, execution of his sentence was stayed by the United States District Court for the

Southern District of New York pending disposition of a petition for a writ of habeas corpus sworn to on the 18th of June, 1971.

The District Court rendered its decision denying the writ of habeas corpus on December 3, 1971. The Court found that "on the basis of both precedent and logic an equally divided affirmance [by this Court] in a criminal case is on the merits" (20a)*, and that "as between the parties involved, it is a conclusive determination . . ." (20a). It further held that subsequent reconsideration of the identical issues by collateral review was therefore precluded by 28 U.S.C. § 2244(c)**.

The United States Court of Appeals for the Second Circuit which had granted a stay on January 4, 1972, reversed the District Court's decision on April 26, 1972. The Court held that the objective of the writ of habeas corpus was to obtain an independent determination by "a federal court" of the legality of detention, "even though the issue may already have been decided on the merits by a state tribunal" (5a). While noting that 28 U.S.C. § 2244(c) provides that no writ of habeas corpus shall issue to a defendant whose claims have been actually adjudicated by this Court, and also conceding it probable that "each of [this Court's] equally divided members has individually considered the constitutional issues", it was ruled that § 2244(c) did not bar the writ as to respondent herein. Although this Court has unequivocally held that its 4-4 affirmances are as conclusive and binding upon the parties as if rendered on the concurrence of all the judges upon every question, the Court below found that this legal principle applies only in civil cases. The Second Circuit remanded to the District Court for consideration of the merits of the petition.

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* Numbers in parentheses refer to the Appendix to this petition.

** The District Court did not consider respondent's constitutional claims because of the threshold bar created by this Court's affirmance.

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Dissenting Judge Mulligan pointed out that 28 U.S.C. § 2244(c) was intended to apply to all dispositions by this Court except denials of certiorari. He stated further:

> "The majority's argument that since there was equal division there was no decision on the merits and therefore no adjudication under the statute is not only without authority but is of course *petitio principii*. The fact that no opinion is written is obviously unimportant . . . Here the court said 'The judgment is affirmed by an equally divided Court.' This is an adjudication. The court said so and I believe we should take it at its word".

Reasons for Allowance of the Writ

1. The decision below is in direct conflict with the applicable decisions of this Court

This Court affirmed by a vote of 4-4, the conviction respondent now seeks to challenge through habeas corpus. All the issues raised in the instant application were previously presented in his appeal. The Court below cited 28 U.S.C. § 2244(c), which prohibits the issuance of a writ of habeas corpus to a prisoner whose constitutional claims have already been adjudicated by this Court, but ruled that respondent could still relitigate these claims because a 4-4 affirmance has no more legal significance in habeas corpus cases than a denial of certiorari. Yet this Court has stated unequivocally that such divided affirmances, while not *stare decisis** as to other parties, are "as conclusive and binding

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*The lack of *stare decisis* effect on other parties is also inherent in an affirmance under the Judicial Code, 28 U.S.C. § 2109 where a case cannot be decided in this Court because of an absence of a quorum of qualified judges. However, any analogy between a 4-4 affirmance and a disposition without a quorum must fail. In the former situation, four judges have considered and decided that the court below was correct in its decision; under § 2109, by contrast, no decision on the merits is reached by any judge.

in every respect upon the parties as if rendered upon the concurrence of all the judges upon every question involved in the case". *Durant* v. *Essex Co.*, 74 U.S. (7 Wall.) 107, 113 (1868); *United States* v. *Pink*, 203 U.S. 194, 216 (1941); *Hertz* v. *Woodman*, 218 U.S. 205, 213 (1909).

The word "conclusive" is of course the same term employed in 28 U.S.C. § 2244(c) to indicate that this Court's disposition "at the instance of the [same] prisoner" precludes the issuance of any writ of habeas corpus.

However, the Court below found that equally divided affirmances in criminal cases were not "in the contemplation of Congress" in 1966 when § 2244(c) was enacted and are therefore not conclusive or binding (8a). Yet the Court lists a number of such affirmances, two predating 1966. See *Slagle* v. *Ohio*, 366 U.S. 259 (1961); *Ohio ex rel. Eaton* v. *Price*, 364 U.S. 263 (1960). Nothing in the legislative history of the statute indicates that Congress intended any exception for 4-4 affirmances. On the contrary, as pointed out in the dissenting opinion of Judge Mulligan, the relevant Senate Report refers only to denials of certiorari as carrying no presumption that federal rights were actually adjudicated (13a). As stated in an authoritative Harvard Law Review article, "It is clear that 'actually adjudicated' questions of law include *all* dispositions except denials of certiorari," Developments in the Law—Habeas Corpus, 83 Harvard Law Review 1038, 1152 (1970) (emphasis added).

A 4-4 affirmance is in no way comparable to a denial of certiorari. The Second Circuit conceded that generally "each of [this Court's] equally divided members has individually considered the constitutional issues" (9a). However, each justice in such an affirmance has not only "considered" but has also reached a conclusion on the merits and voted accordingly. Denials of certiorari mean that the justices did not review the matter at all. *Brown* v. *Allen*, 344 U.S. 433 (1953).

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As the Court made clear in *United States ex rel. Epton* v. *Nenna*, 446 F. 2d 363 (1971), even dismissal of an appeal without any oral argument on the merits, for want of a substantial federal question, is a decision on the merits of all issues raised on appeal. The late Mr. Justice Harlan described such a dismissal as an "adjudication on the merits with all of its consequences." Mr. Justice Harlan, 13 Record of N.Y.C.B.A. 541, 546 (1958).

This Court has not bifurcated its dispositions of petitions and appeals on the basis of whether they emanated from civil or criminal cases. A denial of certiorari, or an affirmance, has a fixed and definite meaning. The cornerstone of the decision below, however, is that this Court's analysis of divided affirmances applies only to civil cases. Neither precedent nor logic supports this thesis. A 4-4 affirmance necessarily results from a vote on the merits by each of eight justices, whether the issues involve criminal or civil matters.

The only case cited on the right of a defendant to seek habeas corpus even after this Court's affirmance by a 4-4 vote, is *United States ex rel. Biggers* v. *Neil*, 448 F. 2d 91 (6th Cir. 1971), which is presently pending before this Court (cert. granted, 40 U.S.L.W. 3410, Feb. 29, 1972). There the Sixth Circuit never even discussed 28 U.S.C. § 2244(c), which (as previously shown) is the controlling statutory provision. Instead, it relied on *Sanders* v. *United States*, 373 U.S. 1 (1963); *Fay* v. *Noia*, 372 U.S. 391 (1963); and *Townsend* v. *Sain*, 372 U.S. 293 (1963)—cases decided three years before 2244(c) was passed by Congress. *Sanders*, *Fay* and *Townsend* make no reference whatever to this Court's affirmances. *Sanders* dealt with the question of successive writs in district courts.*

Biggers further asserted that 4-4 affirmances do not represent any "adjudication of appellant's federal constitu-

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* See § 2244(a), which in 1963 was § 2244.

tional claims on the merits" (448 F. 2d at 97). Yet this Court has stated exactly the contrary as to its divided affirmances. *United States* v. *Pink, supra; Hertz* v. *Woodman, supra; Durant* v. *Essex, supra.* Indeed, the Court in *Biggers* cited *Durant* v. *Essex* as controlling, but failed to cite the relevant holding in *Durant* that a 4-4 affirmance is as conclusive as to the parties as a unanimous affirmance.

Thus, this Court's disposition of respondent Radich's prior appeal provided precisely the "independent determination by a federal court" which as conceded by the Second Circuit (5a), satisfies the objective of the writ of habeas corpus.

2. An important question of public policy is presented, since the effect of the decision below is to nullify the Congressional intent underlying 28 U.S.C. § 2244(c)

As appears on the face of the statute, 28 U.S.C. § 2244(c) is designed to create an absolute bar to entertainment by federal courts of the same controversy, as to the same person, which has already been conclusively adjudicated by this Court. It should be noted that petitioner Radich's appeal to this Court and his subsequent habeas petition, presented no question of fact but rather (as pointed out in the dissenting opinion below at (13a), legal issues as to the constitutionality of § 1425(16)(d) of the Penal Law of New York. Thus, this petition raises the vital question of whether a litigant can present and obtain rulings on identical legal arguments on the same record through the State courts and to this Court, and then through all the federal courts as well.* It is submitted that under these circumstances, it would be an improper exercise of discretion for a federal district judge to consider the granting of a writ, even if there were no statutory bar in existence.

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* It is also significant that under respondent's rationale, he could (if he had lost below) petition this Court for a second decision on the merits, even after this Court's denial of a prior petition for rehearing.

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The court below cites the concurring opinion of Justice Frankfurter in *Brown* v. *Allen, supra,* to support its holding that a state court may not have "the last say" when it may have "misconceived a federal constitutional right" (6a). This decision deals solely with denials of petitions for certiorari, not divided affirmances. Moreover, the considerations underlying *Brown* v. *Allen,* are precisely contrary to the realities of the instant case. Justice Frankfurter was concerned because most petitions for certiorari were "almost unintelligible" because they were drawn by layman; based on incomplete records which failed to indicate whether the claim was actually adjudicated; and provided no transcript on which to determine the adequacy of the state fact-finding procedure (344 U.S. at 493-494).

In the case at bar, as pointed out by dissenting Judge Mulligan, respondent is not an illiterate prisoner and has never lacked competent counsel to present his arguments to the State courts and to this Court. In addition, "There was an ample record from the State courts with written opinions articulating clearly the majority and dissenting positions. There has been nothing peremptory or perfunctory in the disposition by the Supreme Court which heard argument on the merits and which voted on the merits. Radich even petitioned for reargument and lost" (15a-16a).

As indicated in a law review analysis of § 2244(c), the statute requires a defendant to make a strategic choice:

> "[A]fter the unsuccessful exhaustion of state appellate remedies, a defendant desiring federal review of a constitutional claim must decide whether to seek immediate Supreme Court review by appeal or certiorari or to seek later federal review by habeas corpus. If the record is adequately developed, and the facts on the face of the record warrant relief, it is to the defendant's tactical advantage to seek immediate Supreme

Court review. On the other hand, if the record does not show facts adequate to warrant relief, the defendant should seek habeas corpus relief in order to obtain a federal evidentiary hearing to develop the record more fully". 45 Texas L. Rev. 592, 595 (1967)

Respondent Radich is attempting to use both strategies. Thus, the decision below represents an unwarranted extension of federal habeas corpus contemplated neither by Congress nor by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: New York, New York, May 17, 1972.

Respectfully submitted,

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APPENDIX

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APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 584—September Term, 1971.

(Argued March 24, 1972 Decided April 26, 1972.)

Docket No. 71-2185

UNITED STATES *ex rel.* STEPHEN RADICH,

Petitioner-Appellant,

against

THE CRIMINAL COURT OF THE CITY OF NEW YORK; HON. DAVID ROSS, Administrative Judge of the Criminal Court of the City of New York; FRANK S. HOGAN, District Attorney, New York County; and GEORGE F. MCGRATH, New York City Commissioner of Correction,

Respondents-Appellees.

Before:

HAYS, MANSFIELD and MULLIGAN,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, John M. Cannella, *Judge,* dismissing a state convict's petition for habeas corpus on the ground that his state court conviction

was affirmed by an equally divided vote of the United States Supreme Court.

Reversed and remanded for further proceedings.

SHIRLEY FINGERHOOD, New York, N. Y. (Richard G. Green, Burt Neuborne, Melvin L. Wulf, Lawrence G. Sager, New York, N. Y., on the brief), *for Petitioner-Appellant.*

MARIA L. MARCUS, Assistant Attorney General (Louis J. Lefkowitz, Attorney General of State of New York, Samuel A. Hirshowitz, First Assistant Attorney General, New York, N. Y., on the brief), *for Respondents-Appellees.*

MANSFIELD, *Circuit Judge:*

This appeal raises the interesting question, unlikely to recur, of whether an affirmance of a state court conviction by an equally divided vote of the United States Supreme Court bars the person convicted from later obtaining habeas corpus relief on constitutional grounds that were urged by him in his appeal to the Supreme Court. We hold that it does not and remand the petition for consideration on the merits.

On May 5, 1967, Stephen Radich was convicted in the Criminal Court of the City of New York of casting contempt on the American flag in violation of what was then § 1425(16)(d) of the N.Y. Penal Law, now recodified as § 136(d) of the N.Y. General Business Law (McKinney 1968),[1] by displaying several "constructions" in the win-

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[1] Section 136 of the N.Y. Gen. Bus. Law (McKinney 1968) provides in pertinent part:

"Any person who

* * * * * *

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dow of his art gallery, one of which was described by the trial court as "in the form of a large cross with a bishop's mitre on the head-piece, the arms wrapped in ecclesiastical flags and an erect penis wrapped in an American flag protruding from the vertical standard." *People* v. *Radich*, 53 Misc. 2d 717, 718, 279 N.Y.S.2d 680, 682 (1967) (2-1 decision). He was sentenced to pay a $500 fine or serve 60 days in the workhouse. On appeal in the State system his conviction was affirmed. *People* v. *Radich*, 57 Misc. 2d 1082, 294 N.Y.S.2d 285 (App. T. 1st Dept. 1968) (*per curiam*), *aff'd.*, 26 N.Y.2d 114, 308 N.Y.S.2d 846 (1970) (5-2 decision). He then appealed to the Supreme Court of the United States, pursuant to 28 U.S.C. § 1257(2), arguing, as he had in the

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"d. Shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon [the flag] either by words or act . . . Shall be guilty of a misdeameanor.

"The words flag, standard, color, shield or ensign, as used in this section, shall include any flag, standard, color, shield or ensign, or any picture or representation, of either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of, said flag, standard, color, shield or ensign, of the United States of America, or of the state of New York, or a picture or a representation, of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation, may believe the same to represent the flag, colors, standard, shield or ensign of the United States of America or of the state of New York.

"This subdivision shall not apply to any act expressly permitted by the Statutes of the United States of America, or by the United States army or navy regulations, nor shall it be construed to apply to a certificate, diploma, warrant, or commission of appointment to office, ornamental picture, article of jewelry, stationery for use in private correspondence, or newspaper or periodical, on any of which shall be printed, painted or placed, said flag, standard, color, shield or ensign disconnected and apart from any advertisement."

State courts, that his conviction violated the First and Fourteenth Amendments to the Federal Constitution.[2]

After oral argument on the merits the Supreme Court "affirmed by an equally divided court." *Radich* v. *New York*, 401 U.S. 531 (1971) (Mr. Justice Douglas did not participate). Promptly thereafter Radich sought relief by application for writ of habeas corpus in the United States District Court for the Southern District of New York pursuant to 28 U.S.C. § 2241 *et seq.* There he advanced the same arguments previously made to the Supreme Court. In an unreported decision Judge Cannella denied relief on the ground that the affirmance of Radich's conviction by an equally divided Supreme Court constituted an actual adjudication by it on the merits of his Constitutional claims, which by statute, 28 U.S.C. § 2244(c),[3] is a bar to

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[2] He argues that "casting contempt" means to communicate an idea or attitude, that a statute banning such communication is unconstitutional, and that accordingly punishment for exhibition of sculpture on the ground that it is found to be contemptuous of the flag is prohibited by the First Amendment. He also contends that the statute under which he was convicted is overbroad and violates the Equal Protection Clause.

[3] Section 2244(c) of Title 28 of the United States Code provides that:

> "(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, *shall be conclusive as to all issues of fact or law* with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, *actually adjudicated* by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence." (Emphasis supplied).

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subsequent federal habeas corpus relief. A certificate of probable cause was thereupon issued and this appeal was pursued. Execution of Radich's sentence has been stayed.

Our consideration of the effect upon a state prisoner's habeas corpus petition of a Supreme Court affirmance of his conviction by an equally divided vote requires us once again to review the purpose of the Great Writ and the reasons for sometimes denying it on the ground that the constitutional issues have been determined on the merits in another federal proceeding. The writ's objective as embodied in the Constitution and the Judiciary Act, is to assure that when a person is detained unlawfully or in violation of his constitutional rights he will be afforded an independent determination by a federal court of the legality of his detention, even though the issue may already have been decided on the merits by a state tribunal. Congress could have left the enforcement through habeas corpus of federal constitutional rights governing the administration of justice in cases of state prisoners exclusively to the states, since state courts are under the same duty as federal courts to observe and to enforce those rights. *Claflin* v. *Houseman*, 93 U.S. 130, 136-37 (1876). But beginning with the enactment of the Judiciary Act of 1867, 14 Stat. 385, now 28 U.S.C. § 2241(c)(3), it chose to give to federal courts the duty of entertaining and adjudicating writs of habeas corpus filed by those who had been convicted in state court proceedings.

Fundamental to the concept of the federal writ as thus authorized by Congress is that the petitioner will be accorded an adjudication by a federal court of the constitutional issues, provided he makes out a prima facie case, has exhausted his state remedies, and has not without sound reasons deliberately bypassed a controlling state court rule or procedure. *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938);

Fay v. *Noia*, 372 U.S. 391, 439 (1963); *Henry* v. *Mississippi*, 379 U.S. 443, 452 (1965). If he meets these conditions, a federal redetermination of the constitutional issues is mandated. Although a federal district judge may consider and give weight to the state court's adjudication, ". . . State adjudication of questions of law cannot, under the habeas corpus statute, be accepted as binding. *It is precisely these questions that the federal judge is commanded to decide.* . . . Although there is no need for the federal judge, if he could, to shut his eyes to the State consideration of such issues, no binding weight is to be attached to the State determination. The congressional requirement is greater. The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right." *Brown* v. *Allen*, 344 U.S. 443, 506, 508 (1953) (concurring opinion of Justice Frankfurter) (emphasis supplied; fn. omitted). These principles were reaffirmed by the Supreme Court in *Townsend* v. *Sain*, 372 U.S. 293 (1963), where Chief Justice Warren, speaking for the court, stated:

> "Although the district judge may, where the state court has reliably found the relevant facts, defer to the state court's findings of fact, he may not defer to its findings of law. It is the district judge's duty to apply the applicable federal law to the state court fact findings independently. The state conclusions of law may not be given binding weight on habeas." (372 U.S. at 318)

In guaranteeing that a state convict would have a federal determination of his constitutional claims on the merits Congress and the Supreme Court faced the necessity of

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developing principles of finality that would protect against successive applications to federal courts seeking to relitigate issues already decided by a federal tribunal. The problem was complicated by the fact that res judicata could not be invoked to preclude federal habeas relief.

> "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged. If 'government . . . [is] always [to] be accountable to the judiciary for a man's imprisonment,' *Fay* v. *Noia, supra,* at 402, access to the courts on habeas must not be thus impeded. The inapplicability of *res judicata* to habeas, then is inherent in the very role and function of the writ." *Sanders* v. *United States,* 373 U.S. 1, 8 (1963).

With a view to limiting the habeas petitioner to one bite on the merits in the federal court system, the Supreme Court developed equitable principles calling for discretionary denial of the writ where there had been a prior federal adjudication on the merits, e.g., *Salinger* v. *Loisel,* 265 U.S. 224, 230-31 (1924); *Wong Doo* v. *United States,* 265 U.S. 239, 240-41 (1924); *Sanders* v. *United States,* 373 U.S. 1, 8-10 (1963). In 1948 Congress, by its enactment of what is now 28 U.S.C. § 2244(a), codified these judicially-evolved principles. That statute, however, left open the question of whether a prior determination of the constitutional issues by the Supreme Court would bar habeas relief. Consistent with the overall scheme of allowing the petitioner to obtain one federal determination of those issues, Congress in 1966 enacted § 2244(c), which provides that a prior judgment of the Supreme Court denying a federal right that would be a ground for discharge in a habeas corpus proceeding shall be conclusive as to those issues "actually adjudicated by the Supreme Court

therein." It is this phrase which we are called upon to construe.

We have recited the foregoing background to shed light on the Congressional purpose behind § 2244(c). As we view it Congress, in enacting that supplement to the statute, did not intend it to deprive the habeas petitioner of his time-honored right to one federal adjudication on the merits merely because the constitutional issues had been *raised* in a prior proceeding before the Supreme Court. Only if the Supreme Court had actually *decided* the issues would its adjudication be final. Indeed the legislative history of the statute reveals that it was intended to help alleviate a growing burden on the lower federal courts imposed by frivolous habeas corpus petitions by state prisoners who had already had a full consideration and decision of their federal claims by the Supreme Court. See S. Rep. No. 1797, 89th Cong., 2d Sess. (1966). Affirmances by an equally divided court of a state court conviction can hardly have been in the contemplation of Congress; there have been so few in criminal cases that the number of habeas corpus petitions resulting from them cannot have been significant.[4]

In the light of the foregoing background we do not believe that an affirmance by an equally divided vote can fairly be construed as a holding that the constitutional

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[4] Our research has disclosed only six affirmances by the Supreme Court from 1960 to date which possibly fall within this category. Of these, only two predated the passage of § 2244(c) in 1966. See *Ohio ex rel. Eaton* v. *Price*, 364 U.S. 263 (1960) (affirming a denial of State habeas corpus); *Slagle* v. *Ohio*, 366 U.S. 259 (1961); *Biggers* v. *Tennessee*, 390 U.S. 404 (1968); *Anderson* v. *Johnson*, 390 U.S. 456 (1968) (affirming denial of federal habeas corpus to State prisoner); *In Re Spencer*, 397 U.S. 817 (1970) (apparently affirming State contempt conviction, whether confinement involved is unclear); and *Radich* v. *New York*, 401 U.S. 531 (1971).

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issues have been "actually adjudicated by the Supreme Court" within the meaning of § 2244(c). We recognize that it would be safe to assume that unless the Court's division is based on an issue raised by it *sua sponte* each of its equally divided members has individually considered the constitutional issues. Because of the very fact of its equal division, however, the Court has been unable to reach a decision on the merits and there has therefore been no adjudication of them by it.

That Congress does not consider an affirmance by an equally divided court to be an actual adjudication of the merits is corroborated by its enactment of another provision of the Judicial Code, 28 U.S.C. § 2109, which provides that in certain instances when a case on review in the Supreme Court cannot be decided because of the absence of a quorum of qualified justices "the court shall enter its order affirming the judgment of the court from which the case was brought for review *with the same effect as upon affirmance by an equally divided court.*" (Emphasis added.) See e.g., *Prichard* v. *United States*, 339 U.S. 974 (1950). This provision was enacted to allow final disposition of litigation when "appellate review has been had and further review by the Supreme Court is impossible. . . ." H.R. Rep. No. 308, 80th Cong., 1st Sess. A176 (1947).

Rather than strand a case on dead center an equally divided Supreme Court, as the only sensible alternative, leaves in effect the decision of the court below, which is affirmed *ex necessitate*. However, the lower court's decision does not thereby become the decision of the Supreme Court. It remains a state court determination which, as we have noted *supra*, "cannot . . . be accepted as binding." *Brown* v. *Allen*, *supra*, at 506. Furthermore, it is a principle of ancient lineage that an opinion by an equally divided Supreme Court has no stare decisis effect and

thus no value as precedent for the reason that "nothing is settled" by the Court, *Ohio ex rel. Eaton* v. *Price*, 364 U.S. 263, 264 (1960) (opinion of Mr. Justice Brennan); *United States* v. *Pink*, 315 U.S. 203, 216 (1942); *Hertz* v. *Woodman*, 218 U.S. 205, 213 (1910); *Durant* v. *Essex Co.*, 74 U.S. (7 Wall.) 107, 112 (1868); *Etting* v. *Bank of the United States*, 24, U.S. (11 Wheat.) 59, 76 (1826); *The Antelope*, 23 U.S. (10 Wheat.) 66, 125 (1824). Absent an actual decision of the issues by the Supreme Court its equal division has no more legal significance for habeas purposes than denial of certiorari, which has never precluded subsequent collateral relief. *Brown* v. *Allen, supra*, at 456, 458-59, 489-94 (1953).

In support of its contention that the Supreme Court's 4 to 4 affirmance constituted an "actual adjudication on the merits," the state relies principally upon the Supreme Court's venerable decision in *Durant* v. *Essex Co., supra*, at 113, to the effect that such an affirmance is "conclusive and binding in every respect upon the parties", cited with approval in *United States* v. *Pink, supra*. See also *Brown* v. *Aspden's Adm'rs*, 55 U.S. (14 How.) 25, 28 (1853) (per Chief Justice Taney). That decision, however, merely reflects a judicially constructed rule of procedure designed to assure finality in civil litigation that does not involve release from custody. A petition for a writ of habeas corpus by a convicted criminal, being exempt from the doctrine of res judicata, has always stood on a different footing. It is governed by the overriding principle that the doors of the federal courthouse must remain open to the petitioner seeking his liberty until he has obtained a decision on the merits by a federal court with respect to his federal constitutional claims.

> "But conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal

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policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review." *Fay* v. *Noia, supra,* at 424 (1963).

In brief, since an equally divided affirmance by the Supreme Court does not in our view constitute an actual adjudication of the issues on the merits within the meaning of 28 U.S.C. § 2244(c), it does not bar a petition for habeas corpus. Accord, *United States ex rel. Biggers* v. *Neil,* 448 F.2d 91, 97 (6th Cir. 1971), *cert. granted,* —— U.S. ——, 40 U.S.L.W. 3410 (Fed. 29, 1972). Thus the decision of the district court is reversed and the case remanded for consideration of the merits of the petition. The stay of sentence will remain in effect pending its decision.

MULLIGAN, *Circuit Judge* (dissenting):

Stephen Radich, the petitioner herein, is an art dealer convicted in the Criminal Court of the City of New York of casting contempt on the American flag in violation of what was then § 1425(16)(d) of the New York Penal Law by virtue of his display of "new art" forms described in the majority opinion. From the beginning Radich has been represented by able counsel of the American Civil Liberties Union who questioned the constitutionality of the statute under which he was convicted. He was found guilty in a two-to-one decsion of the Criminal Court (*People* v. *Radich,* 53 Misc. 2d 717 (1968)) with opinions by both the majority and dissent. The Appellate Term of the Supreme Court, First Department affirmed unanimously without opinion. (*People* v. *Radich,* 57 Misc. 2d 1082 (1968)). A divided New York Court of Appeals (5-2) affirmed the conviction with majority and dissenting opinions. *People* v. *Radich,* 26 N.Y.2d 114 (1970). The Supreme Court granted review on October 19, 1970 to consider the same constitutional issues which are now pre-

sented to the Federal District Court. (See *Radich* v. *New York*, 39 U.S.L.W. 3161). On February 22, 1971 the issues were argued before the Supreme Court and on March 24, 1971 the United States Supreme Court rendered its decision:

> "PER CURIAM.
>
> "The Judgment is affirmed by an equally divided Court.
> "MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case."

Radich v. *New York*, 401 U.S. 531. Although the Supreme Court said it affirmed the judgment of the New York Court of Appeals, the majority opinion here reaches the conclusion that the Court made no actual adjudication at all because a majority could not reach any decision on the merits and that petitioner, whose petition for rehearing was denied on May 7, 1971 (402 U.S. 989), is now free to again urge these very issues in a *habeas corpus* petition in the United States District Court for the Southern District of New York. I cannot subscribe to this view.

Whatever the law before 1966, it is now evident that we are called upon to construe Title 28 U.S.C. § 2244(c), the purpose of which was "to provide a qualified application of the doctrine of *res judicata* . . . to proceedings on applications for *habeas corpus* by state prisoners." H.R. Rep. No. 1892, 89th Cong., 2d Sess. 3, 8, 13 (1966).[1]

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[1] It is interesting to note that the only case in point, *United States ex rel. Biggers* v. *Neil*, 448 F.2d 91 (6th Cir. 1971), *cert. granted*, —— U.S. ——, 40 U.S.L.W. 3410 (Feb. 2, 1972) does not discuss or even cite in either the majority or dissenting opinions, the governing statute § 2244(c). The majority opinion is based upon pre-statutory case law evolving before the *res judicata* bar enacted by Congress in 1966. It is in accord with the majority here but in view of its failure to construe the statute, I cannot find it convincing and certainly not persuasive.

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The subsection which is set forth in full in footnote 3 of the majority opinion, in essence makes a prior judgment of the Supreme Court conclusive as to all issues of fact or law in a state prisoner's federal *habeas corpus* proceeding, where these issues have been actually adjudicated by the Supreme Court.[2]

Our inquiry therefore is what did the Congress intend by the phrase "actually adjudicated." The Senate Report which provides the legislative history of the subsection states: "This subsection is intended to give a conclusive presumption only to actual adjudications of federal rights by the Supreme Court, and *not to give such a presumption to mere denials of writs of certiorari.*" Sen. Rep. No. 1797, 89th Cong., 2d Sess., in 1966 U.S. Code, Cong. & Ad. News 3663, 3664.[3] (Emphasis added)

The majority opinion takes the position that an affirmance of a state court judgment by an equally divided court has "no more legal significance for *habeas* purposes than denial of *certiorari*, which has never precluded subsequent collateral relief. *Brown* v. *Allen, supra,* at 456, 458-59, 489-94 (1953)." *Brown* v. *Allen,* 344 U.S. 443 (1953) does not deal with or even mention affirmances by an equally divided bench but rather is concerned with mere

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[2] There is no question of fact here but rather legal issues of the constitutionality of § 1425(16)(d) of the Penal Law of New York under which the defendant was convicted. All of these issues were as pointed out above before the Supreme Court.

[3] "It is clear that 'actually adjudicated' questions of law include *all* dispositions except denials of certiorari" Developments in the Law—Habeas Corpus, 83 Harv. L. Rev. 1038, 1152 (1970) (emphasis added and footnote omitted). See also 45 Texas L. Rev. 592, 595 n. 27 (1967).

denials of writs of certiorari.[4] Moreover, Mr. Justice Frankfurter's reasoning in finding that a mere denial of a writ of certiorari by the Supreme Court in a state prisoner case did not bar a subsequent *habeas corpus* application is most illuminating. In his opinion for the court on this point he stated:

> "These petitions for certiorari are rarely drawn by lawyers; some are almost unintelligible and certainly do not present a clear statement of issues necessary for our understanding, in view of the pressure of the Court's work. The certified records we have in the run of certiorari cases to assist understanding are almost unknown in this field. Indeed, the number of cases in which most of the papers necessary to prove what happened in the State proceedings are not filed is striking. Whether there has been an adjudica-

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[4] It should be noted that § 2244(c) refers to a prior judgment of the Supreme Court "on an appeal or by a writ of certiorari". The dismissal of a writ may nonetheless have *res judicata* effect if the circumstances reveal that the court has dismissed on the merits, see *Duncan* v. *Carter*, 299 F.2d 179 (9th Cir.), *cert. denied*, 370 U.S. 952 (1962). In that case a defendant's criminal conviction had been affirmed by the California Supreme Court. The United States Supreme Court initially granted certiorari, but after oral argument on the merits, it dismissed the writ with a brief statement: "the totality of circumstances disclosed fails to support the substantial due process issues tendered in the petitions for certiorari. . . ." *Baldonado* v. *California*, 366 U.S. 417 (1961). The defendant then commenced a federal habeas corpus action, raising the same constitutional issues that she had placed before the Supreme Court. In affirming the district court's refusal to grant the writ, a panel of the Ninth Circuit concluded that the Supreme Court had "actually adjudicated" these claims and hence it was bound to follow that Court's decision. Although this case was decided prior to the enactment of § 2244(c), were the same question to be presented today, habeas corpus relief would be barred under the present statute. Compare *Miller* v. *Carter*, 434 F.2d 824, 826 (9th Cir. 1970), *cert. denied*, 402 U.S. 972 (1971).

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tion or simply a perfunctory denial of a claim below is rarely ascertainable. Seldom do we have enough on which to base a solid conclusion as to the adequacy of the State adjudication. Even if we are told something about a trial of the claims the applicant asserts, we almost never have a transcript of these proceedings to assist us in determining whether the trial was adequate. Equally unsatisfactory as a means of evaluating the State proceedings is the filing of opinions; in less than one-fourth of the cases is more than a perfunctory order of the State courts filed. We would have to have very different records and to alter our consideration of these cases radically if a denial could fairly be deemed to be an undisclosed decision on the merits. In a few cases the issues before the District Court had not even been raised here. In other cases, the emphasis put on the issues here differed considerably from that put on them in the District Courts. Alice could understand, but not I, how under such circumstances a district judge could assume if he is so minded that we 'decided' the question now presented to him." *Brown* v. *Allen, supra,* 344 U.S. at 493-94 (footnotes omitted).

None of the obfuscations and inadequacies surrounding the denial of the writ of certiorari which led Mr. Justice Frankfurter to deny them significance for habeas purposes are present here. Mr. Radich is not an illiterate inmate of a New York State prison—he hasn't spent any time in custody since his 1968 conviction. He has always been represented by competent counsel who have clearly presented his constitutional arguments to the State courts and the United States Supreme Court. There was an ample record from the State courts with written opinions artic-

ulating clearly the majority and dissenting positions. There has been nothing peremptory or perfunctory in the disposition by the Supreme Court which heard argument on the merits and which voted on the merits. Radich even petitioned for reargument and lost. He has had his day in the Supreme Court and more. He failed to persuade a majority of the justices that the statute was unconstitutional and therefore lost.[5]

There is nothing startling in the proposition that an even vote constitutes an affirmance of the judgment appealed. This has long been held and never challenged. While a 4-4 affirmance does not become a binding precedent, the law of the case has been fixed. Thus the Supreme Court held in *Durant* v. *Essex Co.*, 74 U.S. (7 Wall.) 107, 113 (1868) "The judgment is as conclusive and binding upon the parties as if rendered upon the concurrence of all the judges upon every question involved in the case." In *United States* v. *Pink*, 315 U.S. 203, 216 (1942) Mr. Justice Douglas stated that a 4-4 affirmance is "conclusive and binding upon the parties as respects that controversy." In *Hertz* v. *Woodman*, 218 U.S. 205 (1910) the Supreme Court said at pages 213-14:

> "Under the precedents of this court, and as seems justified by reason as well as by authority, an affirmance by an equally divided court is as between the parties a conclusive determination and *adjudication* of the matter adjudged, but the principles of law involved not having been agreed upon by a majority of the court sitting prevents the case from becoming an

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[5] *Fay* v. *Noia*, 372 U.S. 391, 424 (1963) relied upon by the majority requires that federal constitutional rights of personal liberty "shall not be denied without the fullest opportunity for plenary federal judicial review." The record before us establishes in my view that the petitioner here assuredly had that opportunity.

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authority for the determination *of other cases*, either in this or in inferior courts."[8] (Emphasis added)

The majority's argument that since there was equal division there was no decision on the merits and therefore no adjudication under the statute is not only without authority but is of course *petitio principii*. The fact that no opinion is written is obviously unimportant. If the court had simply stated that the judgment is affirmed 5 to 3 that would constitute an adjudication by the Supreme Court. Here the court said "The judgment is affirmed by an equally divided Court." This is an adjudication. The court said so and I believe we should take it at its word.

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[8] Mr. Justice Brennan's statement in *Ohio ex rel. Eaton* v. *Price*, 364 U.S. 263, 264 (1960) that "nothing is settled" by an equally divided court, as I read it, refers not to its lack of finality as to the parties before the court, but rather that it does not settle the law and has no precedential value. It is an adjudication *ex necessitate et ex lege*.

APPENDIX B

Decision of the United States District Court for the Southern District of New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

71 Civ. 2738

UNITED STATES ex rel. STEPHEN RADICH,

Petitioner-Relator,

against

THE CRIMINAL COURT OF THE CITY OF NEW YORK; HON. DAVID ROSS, Administrative Judge of the Criminal Court of the City of New York; FRANK S. HOGAN, District Attorney, New York County; and GEORGE F. MCGRATH, New York City Commissioner of Correction,

Respondents.

APPEARANCES:

Richard G. Green, Shirley Fingerhood, Burt Neuborne, Melvin L. Wulf, Lawrence G. Sager, New York City, for the petitioner-relator.

Louis J. Lefkowitz, N.Y.Atty.Gen., by Samuel A. Hirshowitz and Maria L. Marcus, Asst.Atty.Gens., for the respondents.

CANNELLA, J.

The petitioner's application for a writ of habeas corpus, made pursuant to 28 U.S.C. § 2241 *et seq.*, is denied.

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Decision of the United States District Court for the Southern District of New York.

On May 5, 1967, the petitioner was convicted in the Criminal Court of New York City of casting contempt on the American flag in violation of New York Penal Law §1425(16)(d).[1] People v. Radich, 53 Misc.2d 717, 279 N.Y.S.2d 680 (Crim.Ct.1967). He was sentenced to pay a fine of $500 or to serve a term of 60 days in the workhouse. His conviction was affirmed on appeal in the New York State courts. People v. Radich, 57 Misc.2d 1082, 294 N.Y.S.2d 285 (App.T. 1968), aff'd, 26 N.Y.2d 114, 308 N.Y.S.2d 846, 257 N.E.2d 30 (1970). On October 19, 1970, the Supreme Court of the United States noted probable jurisdiction over this appeal. Radich v. New York, 400 U.S.864 (1970). After hearing oral argument, an equally divided court (4-4)[2] affirmed, on March 24, 1971, the judgment of the New York Court of Appeals. Radich v. New York, 401 U.S. 531, petition for rehearing denied, 402 U.S.989 (1971). On June 2, 1971, the petitioner was directed to surrender on June 29, 1971 for execution of his sentence. On June 21, 1971, by an order to show cause, execution of this sentence was stayed pending determination of this application. Hearings on the application were held on June 23, 1971 and July 14, 1971.

A United States district court has the power under 28 U.S.C. § 2241(c)(3) to grant a writ of habeas corpus to

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[1] This section (currently N.Y. General Business Law § 136) reads in pertinent part:

16. Any person who . . .

d. Shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act, or . . .

f. Shall publicly carry or display any emblem, placard or flag which casts contempt, either by word or act, upon the flag of the United States of America . . .

Shall be guilty of a misdemeanor.

[2] Mr. Justice Douglas took no part in the consideration or decision of this case or the subsequent petition for rehearing.

a prisoner if he is "in custody" in violation of the Constitution of the United States. However, a person need not be in actual physical confinement in order to be "in custody" within the meaning of this section. See Jones v. Cunningham, 371 U.S.236 (1963). The court finds that the petitioner, released on bail but with surrender and incarceration imminent,[3] is sufficiently restrained of his liberty to satisfy this "in custody" requirement.[4] See, e.g., Duncombe v. New York, 267 F.Supp.103,109 n.9 (S.D.N.Y. 1967). See also Marden v. Purdy, 409 F.2d 784 (5th Cir. 1969); Burris v. Ryan, 397 F.2d 553 (7th Cir. 1968); Ouletta v. Sarver, 307 F.Supp.1099 (E.D.Ark.), aff'd 428 F.2d 804 (8th Cir. 1970).

A basic issue raised in this application is whether the equally divided affirmance by the United States Supreme Court of a state conviction is an adjudication "on the merits", thereby precluding subsequent reconsideration by collateral review of the identical issues presented therein. See 28 U.S.C.§ 2244(c).

The court is persuaded that on the basis of both precedent and logic an equally divided affirmance in a criminal case is on the merits. In civil cases, the general rule is that such an affirmance, since it does not settle any principle of law, cannot act as a precedent for future cases. Nevertheless, as between the parties involved, it is a con-

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[3] The petitioner has been released on bail of one dollar ($1) since his conviction and sentence on May 5, 1967. The order of the New York City Criminal Court directing him to surrender is stayed pending the determination of this application.

[4] In any event, the respondent's contention that the petitioner is not in custody is a technical defense which would be unavailable to them once the petitioner surrenders to the authorities, after which time he undoubtedly would file a second petition. See Foster v. Gilbert, 264 F.Supp.209 (S.D.Fla. 1967).

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clusive determination and adjudication on the merits. See Herts v. Woodman, 218 U.S.205,213 (1910). See also United States v. Pink, 315 U.S.194,216 (1941); Durant v. Essex Co., 74 U.S.(7 Wall.) 107,113 (1868). A number of state courts have further held that an equally divided affirmance in a criminal case is on the merits.[6] See, e.g., State ex rel. Hampton v. McClung, 47 Fla.224, 37 So.51 (1904); Dean v. State, 173 Miss.255, 162 So.155 (1935). That particular view is substantiated by a review of the actions taken by the United States Supreme Court [hereinafter "Supreme Court"] in this case. By their noting of probable jurisdiction over the case, four or more Justices indicated that a plenary session of the Supreme Court was necessary to resolve the questions raised. Thereafter, the court received extensive briefs from counsel and, on February 22, 1971, heard oral argument. Subsequently it

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[6] The petitioner cites United States ex rel. Biggers v. Neil, 448 F.2d 91 (6th Cir. 1971) for the proposition that an equally divided affirmance is not on the merits in a criminal case. In the *Biggers* decision, however, the court found that in affirming the original conviction, the United States Supreme Court had dealt with a different issue than that subsequently raised by collateral attack. The court also stated that the petitioner could raise such an issue in his application since res judicata was inapplicable in habeas corpus proceedings and no principle of law was settled by that affirmance. In this case, on the other hand, the petitioner concedes that the issues raised in his present application are identical to those issues previously raised before the Supreme Court. See Petitioner's Memorandum of Law, p. 10. In any event, this court is not persuaded that the principles enunciated by the *Biggers* court are applicable to a situation in which the issues raised by the petitioner have been decided against him by the Supreme Court. Cf. United States ex rel. Epton v. Nenna, 446 F.2d 363 (2d Cir. 1971); United States ex rel. Schnitzler v. Follette, 406 F.2d 319, 337 (2d Cir.), cert. denied, 395 U.S. 926 (1969).

took the case under consideration[6] and, on March 24, 1971, affirmed the judgment of the New York Court of Appeals. After these extensive proceedings, this court concludes that the Supreme Court has decided the case on its merits.[7]

Furthermore, there must be some point in a criminal case when, in the best interest of both the individual criminal defendant and society, litigation over a particular issue ends. In this case, twenty-one judges have considered the

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[6] The Supreme Court has shed some light on its practice in this respect. After noting probable jurisdiction, it "then approaches plenary consideration of the case anew as a Court; votes previously cast in Conference that the judgment of the court appealed from be summarily affirmed . . . do not conclude the Justices casting them, and every member of the Court brings to the ultimate disposition of the case his judgment based on the full briefs and the oral arguments. . . ." Ohio ex rel. Eaton v. Price, 360 U.S. 246, 247 (1959). The issues presented to the Supreme Court were:

1. Does the First Amendment to the United States Constitution permit the suppression of sculpture on the ground that it has been found to be contemptuous of our national symbol?

2. Does the New York flag desecration statute further any governmental interest other than compelling veneration for the flag, and is the interest which is furthered by the statute unrelated to the suppression of free speech?

3. Is the prohibition against casting contempt upon the flag in the statute sufficiently clear, certain and limited to meet the requirement of the First and Fourteenth Amendments.

4. Does the equal protection clause of the Fourteenth Amendment bar the conviction of a gallery operator for displaying sculpture in an art gallery under a statute which permits magazine and newspaper publishers to show photographs of that sculpture in their publications and permits exhibition of paintings on the same theme?

[7] Although no opinion was written, it does not follow that such an "unprincipled" decision is not "on the merits". See Wright Federal Courts § 106 at 495 (1970); Deutch, Neutrality, Legitimacy, and the Supreme Court, 20 Stan.L.Rev. 169, 220-21 (1968); Bickel, The Least Dangerous Branch 126 (1962).

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constitutional issues raised herein and of these, fourteen judges, ten in the state court and four in the Supreme Court, have found no constitutional error.[8] At this point, this district court is persuaded that it would be an abuse of discretion to "reverse" the Supreme Court's adverse ruling in this case. Cf. United States ex rel. Schnitzler v. Follette, 406 F.2d 319, 322 (2d Cir.), cert. denied 395 U.S. 936 (1969); Port Authority Bondholders Protective Committee v. Port of New York Authority, 387 F.2d 259, 262 N.3 (2d Cir. 1967). If this court's deference to that Court's ruling is undue, it is that tribunal, to which the petitioner eventually may apply, which must so decide. See United States ex rel. Epton v. Nenna, 446 F.2d 363 (2d Cir. 1971).

In view of the foregoing, the petitioner's application is hereby denied. The parties are directed to settle an order to that effect.

So ordered.

Dated: New York, N.Y.
December 3, 1971.

JOHN M. CANNELLA,
U.S.D.J.

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[8] In this regard, the court notes that petitioner's judgment of conviction was affirmed for the same reason every other judgment is affirmed, i.e., he failed to convince a majority of the court that there was error in the proceedings in which his judgment was rendered.

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1510

HON. DAVID ROSS, Administrative Judge of the Criminal Court of the City of New York; THE CRIMINAL COURT OF THE CITY OF NEW YORK; FRANK S. HOGAN, District Attorney, New York County; and GEORGE F. MCGRATH, New York City Commissioner of Correction,

Petitioners,

—against—

STEPHEN RADICH,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement	4
Reasons for Denying the Writ	6
I. There is no important question of Federal law and no conflict of decision	6
II. The decision below is clearly correct and in accordance with applicable decisions of this Court	8
Conclusion	11

Table of Cases

Neil v. Biggers, —— U.S. ——, 40 U.S.L.W. 3410, 3415 (1972) 7

Ohio ex rel. Eaton v. Price, 364 U.S. 263 (1960) 9-10

People v. Radich, 53 Misc.2d 717, 279 N.Y.S.2d 680 (Crim. Ct. 1967); 57 Misc.2d 1082, 294 N.Y.S.2d 285 (App. T. 1968); 26 N.Y.2d 114, 308 N.Y.S.2d 846, 257 N.E.2d 30 (1970) 4

PAGE

Radich v. New York, 400 U.S. 864 (1970); 401 U.S. 531 (1971); 402 U.S. 989 (1971) 4, 5

United States ex rel. Biggers v. Neil, 448 F.2d 91 (6th Cir. 1971) 7

Statutes:

Penal Law, New York Section 1425 Subd. 16(d) (Now Gen. Bus. Law, Section 136(d)) 4

28 U.S.C. Section 1254(1) 1

2109 ..... 2, 3, 5, 7

2241 et seq. 5

2244(c) 2, 5, 6, 7, 8

U. S. Constitution:

First Amendment 4

Fourteenth Amendment 4

In the

Supreme Court of the United States

October Term, 1971

No. 71-1510

Hon. David Ross, Administrative Judge of the Criminal Court of the City of New York; The Criminal Court of the City of New York; Frank S. Hogan, District Attorney, New York County; and George F. McGrath, New York City Commissioner of Correction,

Petitioners,

—against—

Stephen Radich,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit (Appendix "A" of Petition) is not yet reported. The opinion of the United States District Court for the Southern District (Appendix "B" of Petition) is not yet reported.

Jurisdiction

Jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1).

Questions Presented

1) Whether an equal division of this Court which results in an affirmance of a State court conviction is an actual adjudication of Federal constitutional issues within the meaning of 28 U.S.C. Section 2244(c) and bars consideration of those issues in a habeas corpus proceeding?

2) Whether 28 U.S.C. Section 2109, which requires that where the Supreme Court lacks a quorum it affirm the judgment of the court below "with the same effect as upon affirmance by an equally divided court," demonstrates the intent of Congress to exclude such affirmances from the conclusive presumption given only to actual adjudications under 28 U.S.C. 2244(c)?

Statutes Involved

Section 2244(c) of Title 28 of the United States Code:

> (c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and

controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

Section 2109 of Title 28 of the United States Code:

If a case brought to the Supreme Court by direct appeal from a district court cannot be heard and determined because of the absence of a quorum of qualified justices, the Chief Justice of the United States may order it remitted to the court of appeals for the circuit including the district in which the case arose, to be heard and determined by that court either sitting in banc or specially constituted and composed of the three circuit judges senior in commission who are able to sit, as such order may direct. The decision of such court shall be final and conclusive. In the event of the disqualification or disability of one or more of such circuit judges, such court shall be filled as provided in chapter 15 of this title.

In any other case brought to the Supreme Court for review, which cannot be heard and determined because of the absence of a quorum of qualified justices, if a majority of the qualified justices shall be of opinion that the case cannot be heard and determined at the next ensuing term, the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court.

Statement

Respondent Stephen Radich was convicted in the Criminal Court of the City of New York on May 5, 1967 of casting contempt on the American flag in violation of what was then Section 1425(16)(d) of the New York Penal Law, now Section 136(d) of the New York General Business Law.

Radich's conviction was based upon an exhibition of certain sculptures termed "constructions" in his second floor art gallery. *People* v. *Radich*, 53 Misc. 2d 717, 279 N.Y.S.2d 680 (1967). He was sentenced to pay a $500 fine or serve 60 days in the workhouse.

The Appellate Term, First Judicial Department, of the Supreme Court of the State of New York affirmed without opinion (57 Misc. 2d 1082, 294 N.Y.S.2d 285 (1968)). The New York Court of Appeals affirmed the conviction on February 8, 1970, 26 N.Y.2d 114, 308 N.Y.S.2d 846, by a 5-2 vote.

Radich then appealed to the Supreme Court of the United States on May 18, 1970. Probable jurisdiction was noted on October 19, 1970. *Radich* v. *New York*, 400 U.S. 864. Before this Court he argued, as he had in the State courts, that his conviction violated the First and Fourteenth Amendments to the Federal Constitution for reasons, *inter alia*, that the statutory prohibition against casting contempt on the flag violated the First Amendment because to "cast contempt" means to communicate an idea or attitude and the statute therefore is directed specifically against communication. He also argued that the statute under which he was convicted was overbroad and violated the equal protection clause.

This Court "affirmed by an equally divided Court", *Radich* v. *New York*, 401 U.S. 531 (1970), Mr. Justice Douglas not participating. Thereafter Radich applied for a writ of habeas corpus in the United States District Court for the Southern District of New York pursuant to 28 U.S.C. §2241 *et seq.* The Court, by Canella, *J.*, denied relief on the ground that 28 U.S.C. §2244(c) barred federal habeas corpus relief because the equally divided Supreme Court affirmance of the State court conviction constituted an actual adjudication of the merits of the constitutional claims then before the District Court.

The United States Court of Appeals for the Second Circuit granted a stay on January 4, 1972 and reversed the District Court's decision on April 26, 1972. The Court held that an affirmance by an equally divided vote was not an actual adjudication by the Supreme Court within the meaning of §2244(c). The Court of Appeals ruled that the Supreme Court was unable to reach a decision on the constitutional issues because of its equal division and thus the State court's decision remained in effect because there has been no federal adjudication of Radich's Federal constitutional rights.

The Court cited another provision of the Judicial Code, 28 U.S.C. §2109, as corroboration of Congress's view that a 4-4 decision by this Court is not an actual adjudication of constitutional claims within the purview of §2244(c). Section 2109 provides that when a case on review from a State court cannot be decided by the Supreme Court because of the lack of a quorum, "the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court."

The Court of Appeals for the Second Circuit reversed and remanded to the District Court for consideration of the constitutional claims raised by the petition.

REASONS FOR DENYING THE WRIT

I.

There is no important question of Federal law and no conflict of decision.

The issue in the present case is, in the words of the Court of Appeals, "unlikely to recur" (2a)* and is too narrow to warrant review by this Court on certiorari. It can arise only in those few cases where a writ of habeas corpus is sought by a person whose State court conviction has been affirmed as a result of an equal division of this Court. The Court below found only six examples of equal division by this Court upon appeals from State court convictions since 1960.

The case does not in any sense broadly concern the habeas corpus jurisdiction of the Federal courts. It involves only the application of §2244(c) of the Judicial Code, which bars consideration in habeas corpus proceedings of issues which have been actually adjudicated by the Supreme Court in a prior appeal by the petitioner, in the unusual situation where the Supreme Court has been unable to reach a decision on such issues because it is equally divided.

To focus precisely on the dimensions of the issue presented for Supreme Court consideration, it may be pointed

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* Numbers in parentheses refer to the Appendix to the petition.

out that petitioners ask this Court to decide that its failure to reach agreement on a case is an actual adjudication, or real decision, of the issues presented by the appeal.

There is no conflict of decisions on this narrow issue. Two Courts of Appeal—for the Second Circuit in this case, and for the Sixth Circuit in *Neil* v. *Biggers*, 448 F.2d 91 (6th Cir. 1971) cert. granted —— U.S. ——, 40 U.S.L.W. 3410, 3415 (1972)—have ruled squarely that a 4-4 decision is not an actual adjudication of issues within the meaning of §2244(c) of the Judicial Code and does not bar a consideration of the same issues in a habeas corpus proceeding.

The writ of certiorari was granted in *Neil* v. *Biggers* when the District Court decision in respondent's case was pending on appeal to the Court of Appeals. At that time there was a possibility of a conflict between decisions of Courts of Appeals for the Sixth Circuit and for the Second Circuit. That possibility has been eliminated by the decision below; the circuits are now in accord. Petitioner therefore respectfully requests that the Court consider dismissing the writ of certiorari in *Biggers*, as well as denying the petition herein.*

In addition, the opinion of the Court below in the instant case cites a statute, Section 2109 of the Judicial Code, which respondent believes was not brought to the attention of this Court when it considered the application for a writ of certiorari in *Biggers*. 28 U.S.C. §2109, provides that in certain instances when a case on review in the Supreme

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* Respondent is, of course, aware that this is not the only issue raised in the petition for writ of certiorari in *Biggers* and accordingly, his request does not relate to the other issue.

Court cannot be decided because of the absence of a quorum of qualified justices "the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court."

The use by Congress of an affirmance by an equally divided Court as the analogy for final disposition by affirmance when this Court cannot sit on an appeal, was cited by the Court below as corroboration of Congressional intention that only a majority decision of this Court would bar consideration of Federal claims in a habeas corpus proceeding.

II.

The decision below is clearly correct and in accordance with applicable decisions of this Court.

After a review of Congressional enactments authorizing Federal courts to entertain writs of habeas corpus by persons convicted in State court proceedings, the Court below concluded that in enacting Section 2244(c) Congress did not intend to deprive the habeas petitioner of his right to one federal adjudication of Federal constitutional issues merely because those issues had been previously raised before the Supreme Court. "Only if the Supreme Court had actually *decided* the issues would its adjudication be final". (8a). (Emphasis in original.) Since the very fact of an equal division meant that the Supreme Court was unable to reach such a decision, the Court held that under such circumstances there had been no adjudication of the issues.

In addition, the Court below stated:

> That Congress does not consider an affirmance by an equally divided court to be an actual adjudication of the merits is corroborated by its enactment of another provision of the Judicial Code, 28 U.S.C. §2109, which provides that in certain instances when a case on review in the Supreme Court cannot be decided because of the absence of a quorum of qualified justices "the court shall enter its order affirming the judgment of the court from which the case was brought for review *with the same effect as upon affirmance by an equally divided court.*" (Emphasis added.) See e.g., *Prichard* v. *United States,* 339 U.S. 974 (1950). This provision was enacted to allow final disposition of litigation when "appellate review has been had and further review by the Supreme Court is impossible. . . ." H.R. Rep. No. 308, 80th Cong., 1st Sess. A176 (1947). (9a).

Petitioners argue only that an affirmance by an equally divided Court constitutes an actual adjudication of the issues raised before the Court, first, because such affirmances are conclusive and binding upon the parties in civil cases; and second, because such affirmances differ from denials of writs of certiorari, which the legislative history of the subsection excepts from its purview.

The Court below properly rejected those arguments. Pointing out that the conclusive and binding effect of affirmances by an equally divided Supreme Court in civil actions is irrelevant to a habeas corpus proceeding, the Court of Appeals noted the statement that where there is an equal division " 'nothing is settled' by the Court, *Ohio ex rel.*

Eaton v. *Price*, 364 U.S. 263, 264 (1960) (opinion of Mr. Justice Brennan)." (10a).

Petitioners' second contention conflicts with their first: if civil cases are relevant, then it must be noted that the denial of a writ of certiorari in a civil case leaves in effect a judgment as final and binding upon the parties as a 4 to 4 affirmance. When neither party to a civil action petitions for a writ of certiorari, the judgment in effect is equally conclusive and binding. Yet habeas corpus is available to a criminal defendant whose petition for a writ of certiorari from a state conviction is denied or who does not petition for such a writ.

In review of the foregoing, the decision of the Court below is correct and accords with decisions of this Court with respect to its equally divided affirmances.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated: New York, N. Y.
June 8, 1972

Respectfully submitted,

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